FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 15 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 925

3963 Bottles, more or less, etc., OWEN LABORATORIES, INC.,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MILTON A. BASS,
SOLOMON H. FRIEND,
Counsel for Petitioner,
342 Madison Avenue,
New York 17, N. Y.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

INDEX TO BRIEF

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	5
A. Res Administrata	5
B. Privilege Against Self-Incrimination	7
Conclusion	9

CASE CITED

U. S. v. Dotterweich, 320 U. S. 277, 64 S. Ct. 1087 (1943) 2, 5, 8

STATUTES CITED

	PAGE
28 U. S. C. 1254(1)	2
Sections 301 (a), 301 (d), 303 (a), 304 (a), 502 (a) and 505 (a), Federal Food, Drug and Cosmetic Act [21 U. S. C. 331 (a), 331 (d), 333 (a), 334 (a), 352 (a) and 355 (a)]	2, 3, 4, 8, 9
Rules 33 and 37 (d), Federal Rules of Civil Procedure	3, 5
Fifth Amendment to the Constitution of the United States	3, 5

INDEX TO APPENDIX

APPENDIX A:	
Memorandum	1a
Decree of Condemnation	3a
Opinion of the United States Court of Appeals for the Seventh Circuit	5a
Decree of the United States Court of Appeals	14a
APPENDIX B:	
Statutes	15a

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No. .....

3963 Bottles, more or less, etc., OWEN LABORATORIES, INC.,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 31, 1959.

Citations to Opinions Below

The opinion of the District Court denying petitioner's motion to dismiss the libel of information and for summary judgment is printed in Appendix A, *infra*, p. 1a, and is not officially reported. No opinion was rendered by the District Court on its order granting respondent's

motion for a default decree of condemnation for failure of the petitioner corporation to serve answers to respondent's written interrogatories. The decree of condemnation is printed in Appendix A, *infra*, p. 3a.

The Court of Appeals affirmed in an opinion printed in Appendix A, *infra*, p. 5a, which is not yet officially reported.

Jurisdiction

The decree of the Court of Appeals was made on March 31st, 1959 (Appendix A, *infra*, p. 14a), and the mandate of the Court stayed pending the filing and determination of the instant writ of certiorari, pursuant to Rule 28 of the Rules of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a new principle of *res administrata* should be adopted to create the same bar in administrative proceedings that *res judicata* creates in judicial proceedings.

2. Whether an exception to the rule of law that a corporation cannot invoke the privilege against self-incrimination should be promulgated under the special provisions of the Federal Food, Drug and Cosmetic Act and the decision of *U. S.* v. *Dotterweich*, 320 U. S. 277, 64 S. Ct. 1087 (1943) wherein criminal liability is imposed not only upon the corporation, but in addition, automatically upon a broad class of persons who have a responsible share in the furtherance of the transaction complained of, regardless of intent, participation or knowledge.

Statutes Involved

The statutory provisions involved are Sections 301 (a), 301 (d), 303 (a), 304 (a), 502 (a) and 505 (a) of the Federal Food, Drug and Cosmetic Act [21 U. S. C. 331 (a), 331 (d), 333 (a), 334 (a), 352 (a) and 355 (a)]. Also involved are Rules 33 and 37 (d) of the Federal Rules of Civil Procedure and the Fifth Amendment to the Constitution of the United States. They are printed in Appendix B, *infra*, p. 15a.

Statement

The instant action was commenced on December 19, 1957, by the seizure of quantities of petitioner's product upon the ground that it was misbranded under 21 U. S. C. 352 (a) because of alleged false and misleading claims in petitioner's advertising material, and upon the further ground that the product was a "new drug", within the meaning of 21 U. S. C. 355 (a), premised solely upon the same alleged claims in the same advertising material.

Prior to the commencement of the instant seizure action, and on or about September 1957, the United States Post Office Department instituted an action with respect to the same product involved in this seizure action, alleging that certain false representations were being made for the product in petitioner's advertising material.

The action with the Post Office Department was settled by means of an Affidavit of Agreement on September 26, 1957 (A 134, 135). The agreement provided for regulation of the petitioner's advertising material wherein certain prohibitory and permissive areas of advertising claims were set forth.

The Post Office Department subsequently commenced a proceeding in which it alleged that petitioner's new

advertising material was violative of the agreement and sought the issuance of a fraud order pursuant to the terms of the said agreement. A formal hearing was held and a decision rendered, that petitioner's advertising material was in conformity with and not in breach of petitioner's agreement with the Post Office Department. (U. S. Post Office Department H. E. Docket No. 5/143, in re *Owen Laboratories*).

The instant action constitutes an attack upon the legality of the same product and advertising material involved in the prior proceedings. The instant action constitutes an attack upon the regulatory agreement of the Post Office Department.

A decision in favor of respondent in this case of necessity, would be a ruling that the Post Office Department agreement is illegal and that the Post Office Department decision is invalid.

Petitioner urged that the executive branch of Government was barred from collaterally attacking its own agreement by means of a second proceeding. In effect, petitioner requested a bar in administrative proceedings comparable to the bar of *res judicata* in judicial proceedings.

On September 23, 1958, the District Court filed a memorandum opinion denying petitioner's motion, holding in effect that there could be no *res judicata* because *res judicata* requires an adjudication. This statement of law is correct, as adjudication does not occur in administrative proceedings.

On September 29, 1958, petitioner filed an answer to respondent's written interrogatories theretofore filed, declining to answer same on the grounds that under the Federal Food, Drug and Cosmetic Act, the same alleged wrong carried with it civil as well as criminal penalties, not only as against the petitioner corporation, but upon

all corporate officers, representatives and agents who have a responsible share in the furtherance of the transaction which the statute outlaws, and consequently, the matters inquired into were privileged under the Fifth Amendment to the Constitution of the United States.

On October 8, 1958, respondent moved for a default decree of condemnation under Rule 37 (d) of the Federal Rules of Civil Procedure for failure of petitioner to serve interrogatories. On October 22, 1958, the District Court granted said motion and entered a decree condemning the seized articles and a stay of the decree pending appeal to the Court of Appeals for the Seventh Circuit.

On appeal, the Court of Appeals affirmed, holding that *res judicata* principles were not present. Petitioner agrees that *res judicata* is not applicable by reason of the fact that administrative (quasi-judicial) proceedings do not act by issue adjudication in the same manner as our classical judicial proceedings.

On the issue of whether a corporation could assert a privilege and decline to answer interrogatories under the special circumstances of the Federal Food, Drug and Cosmetic Act, the Court held that the corporation must select an agent to provide the interrogatories, who would not be incriminated, but did not answer the question posed by the decision of *U. S.* v. *Dotterweich*, in the premises.

Reasons for Granting the Writ

A. Res Administrata

The rapid growth of administrative agencies during the past twenty-five years has given rise to the dominance of administrative law in our economic and social life.

This growth and power of administrative law has created the concomitant need for legal principles in regulation

of these quasi-judicial proceedings in order to safeguard our traditional concepts of due process.

Petitioner is here urging the adoption of a bar against multiple actions for the same cause in administrative proceedings in the same manner that *res judicata* accomplishes finality in judicial proceedings.

Our Courts have heretofore approached this problem by attempting to forge the judical tool of *res judicata* into this new and growing area of law. *Res judicata*, however, is not applicable to, and cannot be applied in administrative proceedings.

The principle of *res judicata* was created to function in our judicial proceedings consisting of single issue adjudications. By definition, we do not have single issue adjudication, nor adjudication itself, in administrative proceedings. *Res judicata* is therefore not present, nor can it be applied, in administrative law.

Petitioner urges the adoption of a principle of *res administrata* to conform to the realities of the quasi-judicial functioning of administrative law, wherein there is one executive branch of government regulating (administrating) a *res* or subject matter.

In the instant matter, one executive agency instituted proceedings in regulation of petitioner's product and advertising material. This proceeding culminated in an agreement whereby prohibitory and permissive advertising claims are spelled out. Thereafter, a second action (the instant action) was instituted by another executive agency attacking the petitioner's advertising claims and the agreement theretofore executed. The instant action constitutes a collateral attack upon the prior agreement and proceeding.

Petitioner urges that this second action be barred. Petitioner submits that there is privity among the execu-

tive administrative agencies so that we have the same party in both proceedings performing regulatory power over the same subject matter.

When the executive branch of government executed the agreement in regulation of the advertising claims, it is chargeable with knowledge of all federal laws of the United States, affecting the legality of said advertising claims.*

The government cannot thereafter, by means of a second action, collaterally attack the legality of its prior agreement or regulatory proceeding.

This ruling does not involve, as stated by the Court of Appeals, a requirement that one agency enforce the laws of another agency. Rather, it charges the first executive agency with knowledge of all the laws of the United States so as to create a bar against a second proceeding attacking, as illegal, the regulation or determination arrived at in the first proceeding.

The need for administrative law and administrative agencies is admitted, but there arises a concomitant need for the creation of protective rules of law to safeguard our traditional concepts of due process.

Once again we must turn to the creative living organism of the law to answer the felt needs of our times.

B. Privilege Against Self-Incrimination

Petitioner urges the adoption of an exception to the rule of law withholding from a corporation the Constitutional privilege against self-incrimination.

A corporation is deemed to be an incorporeal legal entity, separate, distinct and apart from its members. Thus,

* This is a no greater burden than that which is placed upon all persons in our Courts. Ignorance of the law is no defense.

the privilege against self-incrimination, designed to protect natural persons from the threat of testimonial compulsion, imprisonment or capital punishment, has been properly withheld from these incorporeal separate, legal entities.

In the instant case, however, the Federal Food, Drug and Cosmetic Act does not treat the corporation as an entity, separate, distinct and apart from its members, but instead, equates the corporate identity with that of a broad class of its members.

As interpreted in *U. S.* v. *Dotterweich, supra,* the Act imposes criminal liability not only upon the corporation, but automatically upon a broad class of individuals who have a responsible share in the furtherance of the transaction complained of. The Act visits criminal liability for corporate wrongs upon this class of individuals, irrespective of intent, participation or knowledge of the violative conduct.

The Federal Food, Drug and Cosmetic Act, as interpreted by this Court, has shattered the corporate entity for the imposition of criminal liability.

The Court, in *U. S.* v. *Dotterweich, supra,* recognized that it was creating a class of individuals upon whom criminal liability automatically falls, when it stated:

> "It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility."

Petitioner respectfully submits that once having pierced the corporate veil to impose criminal liability, the veil remains open to permit the assertion of our Constitutional protection against self-incrimination. The very reason underlying the rule of law denying the Constitutional privilege to corporations, does not appear in the instant case, or any other case under the Federal Food, Drug and Cosmetic Act. The very policies underlying the Constitutional privilege would be frustrated, should the privilege be denied the corporation under the special circumstances herein presented.

This case, therefore, apart from important Constitutional questions, raises a question of recurrent significance in the enforcement and administration of the Federal Food, Drug and Cosmetic Act.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
Counsel for Petitioner.

May 15th, 1959

APPENDIX A

UNITED STATES DISTRICT COURT

(Caption—No. 57 C 2021)

Memorandum

(Filed Sept. 23, 1958)

This is a libel of information brought by the Government under Title 21 U. S. C. § 334, for the condemnation of certain bottles of a drug called "Enerjol". The condemnation is sought on the grounds that the contents of the bottles are misbranded under Section 352 (a), and that "Enerjol" is a "new drug" under Section 355 (a), as to which no effective application has been filed under Section 355 (b).

The claimant has moved to dismiss the libel and for a summary judgment. The sole basis for the motion is that in September, 1957, claimant entered into an agreement with the Post Office Department in an action brought against claimant by that Department under the provisions of Title 39 U. S. C. Sections 259 and 732, and allegedly concerned with the same product and same labels as those here involved. It is claimant's position that in view of the former proceedings, and the agreement, the present libel subjects claimant to a "multiplicity of actions" and "unjust harassment", and that the agreement in the post office section is a bar "in effect akin to the legal principle of res adjudicata".

The last argument is clearly in error. The doctrine of res adjudicata applies only when there has been an actual adjudication of the same issues in a prior pro-

ceeding. [United States v. International Building Co., 345 U. S. 502, 505 (1953)].

Such is not the case here. In the Post Office proceeding, the issue was actual intent to deceive by means of false or fraudulent pretences [Reilly v. Pinkus, 338 U. S. 276 (1949)]. Here, the issue is whether the article is misbranded. It is settled in this Circuit that "the offense of using the mails to defraud and the offense of introducing or delivering for introducing into interstate commerce misbranded drugs are not the same, and hence there is no res judicata". [United States v. Kaadt, 171 F, 2d 600, at 605 (7th Cir., 1949); see also United States v. 42 Jars etc., 160 F. Supp. 818, 821 (D. N. J. 1958)].

Claimant argues that he is not contending that the traditional doctrine of res adjudicata applies, but that something "akin" to it is involved. This argument also must fail. However far one might stretch the traditional doctrine, it must at least involve some form of prior adjudication definite enough to form a standard against which the current action can be measured. In the instant situation there was no adjudication of any sort in the Post Office action. The agreement (attached to the motion) shows that claimant there merely agreed to refrain from making certain representations in the future. If this amounts to anything, it is an admission by claimant against his interests in this suit. Finally, the agreement provides that it "will not act as a defense for violation of any other statute". This in itself should preclude its use here.

The argument that claimant is being subjected to "multiplicity of actions" and "undue harassment" is a specious one. It is perfectly apparent that the purposes and effect of the Post Office action and one for condemnation are entirely different and that the two remedies are

properly distinct and co-existent. [United States v. One Dozen Bottles, 146 F. 2d 361, 363 (4th Cir., 1944)].

For the foregoing reasons, the motions to dismiss and for a summary judgment are denied.

PHILIP L. SULLIVAN
Judge

September 23rd, 1958

Decree of Condemnation

UNITED STATES DISTRICT COURT

(Caption—No. 57 C 2021)

This case having come before the Court on the motion of R. Tieken, the United States Attorney for the Northern District of Illinois, pursuant to Rule 37 (d) of the Rules of Civil Procedure for the United States District Courts, for an order of default decree of condemnation against the above described article for failure of the claimant, Owen Laboratories, Inc., to serve answers to written interrogatories propounded pursuant to Rule 33 of the Federal Rules of Civil Procedure:

And it appearing to the Court, after being fully advised in the premises, that on April 15, 1958, libelant served upon claimant, Owen Laboratories, Inc., written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure;

And it further appearing that the Court has heretofore entered an order in this cause requiring the claimant to answer the said written interrogatories;

And it further appearing that on September 29, 1958, the claimant, Owen Laboratories, Inc., filed a paper declining to answer libelant's written interrogatories on the ground of self-incrimination, it is

Ordered, Adjudged, And Decreed that the motion of libelant for default decree of condemnation pursuant to Rule 37 (d) of the Federal Rules of Civil Procedure, for failure of the claimant to answer interrogatories be, and hereby is, granted; and it is further

Ordered, Adjudged, And Decreed that the article of drug under seizure be and hereby is, condemned and forfeited to the United States of America pursuant to 21 U. S. C. 334 (a); and it is further

Ordered, Adjudged, And Decreed pursuant to 21 U. S. C. 334 (d) that the United States Marshal for this District shall destroy said article under seizure and make due return to this Court; and it is further

Ordered, Adjudged, And Decreed pursuant to 21 U. S. C. 334 (e) that the United States of America shall recover from Owen Laboratories, Inc., claimant herein, Court costs, fees, storage and other proper expenses.

Dated at Chicago, Illinois, this
22nd day of October, 1958.

/s/ PHILIP L. SULLIVAN
United States District Judge

—o—

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12514

SEPTEMBER TERM, 1958—JANUARY SESSION, 1959

UNITED STATES OF AMERICA,
Libelant-Appellee,

v.

3963 Bottles, more or less, of an article of drug labeled in part: "• • • ENERJOL DOUBLE STRENGTH" • • • OWEN LABORATORIES, INC.,
Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 31, 1959

Before DUFFY, *Chief Judge,* HASTINGS and KNOCH, *Circuit Judges.*

HASTINGS, *Circuit Judge.* The Government, libelant-appellee, brought this action under the provisions of the

Federal Food, Drug and Cosmetics Act, 21 U.S.C.A. §§ 301 *et seq.*, for the condemnation and seizure of a drug called "Enerjol." The corporate claimant, Owen Laboratories, Inc., refused to answer the libelant's interrogatories on the ground of self-incrimination and the district court thereupon entered a default decree of condemnation. This appeal is taken from that decree and from an order of the district court denying claimant's motion for dismissal of the libel and for summary judgment.

The instant suit was commenced in December of 1957. The amended libel charged that the drug, "Enerjol," was misbranded while held for sale after shipment in interstate commerce within the meaning of 21 U.S.C.A. § 352(a), and also alleged that the drug was a "new drug" which was introduced into interstate commerce without an effective new drug application as provided in 21 U.S.C.A. § 355(a) and (b).

Prior to this action, in September of 1957, the Post Office Department had issued a fraud complaint against Owen Laboratories, Inc., charging it with having obtained money through the mails by means of fraudulent representations regarding the nature of and benefits to be obtained from the so-called "Enerjol Capsules." In order to avoid having a fraud order entered against it, Owen Laboratories filed an "Affidavit of Agreement" in which it consented to cease making the representations charged to be fraudulent in the Post Office complaint.

Claimant moved for a dismissal of the instant suit and for summary judgment, on the ground that the agreement with the Post Office, entered into after initiation of the mail fraud proceeding, was, in effect, an adjudication[1]

[1] By "adjudication" claimant refers to any type of administrative action. It argues extensively in its brief for the adoption by this court of a new rule of *"res administrata"* embodying principles "akin to the legal principle of *res adjudicata*" but tailored to fit problems peculiar to administrative law.

with respect to the identical product, the identical literature and identical issues involved in this libel; and that the agreement "constitutes a bar to the present action and is in effect akin to the legal principle of *res adjudicata*." The district court denied this motion setting forth its reasoning in a brief memorandum opinion which indicates that it fully understood and rejected claimant's arguments made before that court and renewed in this appeal. We hold that the district court committed no error in denying this motion.

The mail fraud proceeding could not possibly be a bar to the instant action. In the first place, the agreement executed by claimant in connection with the mail fraud proceeding is, by its own express terms and contrary to claimant's contentions, not an approval or ratification of any business conducted or to be conducted by claimant. The agreement further states expressly that "its filing will not act as a defense or relieve the undersigned [claimant's president] of responsibility for violation of any other statute . . . ."

Further, when stripped of its refinements, claimant's position appears to be that the Postmaster General, with his limited authority under the mail fraud statutes, could and should have somehow effectively enforced the provisions of the Federal Food, Drug and Cosmetics Act; and that, since he did take some action, as evidenced by the agreement, the Government is now barred from enforcing that Act against the offending product.

Viewing claimant's contentions in this light merely points up the fact that the proceeding under the mail fraud statute and the instant one differ not only as to issues involved, but also as to purpose and effect. The Postmaster General has only the limited authority to prohibit the fraudulent use of the mails, and the sole pur-

pose of a mail fraud proceeding is to enjoin the continuation of conduct found fraudulent. *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 191 (1948). There must be proof of a fraudulent purpose, an actual intent to deceive, on the part of the alleged violator. *Reilly* v. *Pinkus*, 338 U. S. 269, 276 (1949).

On the other hand, the present suit under the Food, Drug and Cosmetics Act has as its purpose the seizure and actual removal of the allegedly offending articles from the channels of trade. Under this Act, no proof of wrongful or fraudulent intent is required either in criminal proceedings brought under its provisions, *United States* v. *Dotterweich*, 320 U. S. 277, 281, 284-285 (1943), or in seizure cases such as the instant one. *Research Laboratories* v. *United States*, 9 Cir., 167 F. 2d 410, 420-421 (1948); *United States* v. *Five Cases, etc.*, 2 Cir., 156 F. 2d 493, 495 (1946). The Supreme Court in *Dotterweich* pointed out that by this Act, as amended in 1938:

> "* * * Congress extended the range of its control over illicit and noxious articles * * *. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection. * * * In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich, supra* at 280-281.

In the libel in this case the drug is alleged to be subject to seizure not only as misbranded (falsely labeled) but also as a new drug introduced into interstate commerce without an effective new drug application to establish its safety as is required by law. The proceeding and resulting agreement under the mail fraud act could be no bar to this suit.

Reliance by claimant on *United States* v. *Willard Tablet Co.*, 7 Cir., 141 F. 2d 141 (1944) is misplaced. In that case, a prior decision by the Federal Trade Commission had *approved* statements used by an alleged violator and ruled that the statements were not false representations. We hold that a subsequent condemnation proceeding, under the Federal Food, Drug and Cosmetics Act based on identical statements as to the same product was barred, on principles of *res adjudicata*, because the same issues and elements of proof were involved in both proceedings. The case of *George H. Lee Co.* v. *Federal Trade Commission*, 8 Cir., 113 F. 2d 583 (1940) also cited by claimant is to the same effect.

Claimant also relied heavily, in its brief, on the case of *United States* v. *Radio Corporation of America and National Broadcasting Company, Inc.*, E. D. Pa., 158 F. Supp. 333 (1958). In that case the district court decided that approval by the Federal Communications Commission of a proposed exchange of radio and television stations, precluded a subsequent suit in which the Government sought to upset the transaction as violative of the anti-trust laws. However, just prior to oral argument in the present case, the Supreme Court of the United States, having noted probable jurisdiction at 357 U. S. 918 (1958), unanimously reversed the district court. *United States* v. *Radio Corporation of America and National Broadcasting Company, Inc.* .... U. S. .... (1959).[2] The Supreme Court held that the Federal Communications Commission had no power to decide anti-trust issues as such and that, consequently, its determination that the "public interest, convenience and necessity" would be served by the proposed exchange of radio and television stations did not bar the subsequent anti-trust suit. In so doing

[2] Mr. Justice Frankfurter and Mr. Justice Douglas took no part in the consideration or decision of the case.

the Court found *res judicata* principles inapplicable since, as in the instant case, different issues were involved. *Id.* at ..... In our view, this holding alone would be completely dispositive of claimant's contention.

It is next contended that the district court erred in entering the default decree of condemnation upon claimant's failure to answer libelant's interrogatories. The refusal of the corporation to answer was based on an assertion of a claim of privilege against self-incrimination. However, it is settled beyond possible doubt that a corporation has no such privilege to assert. *United States* v. *White*, 322 U.S. 694 (1944). In the *White* case, the Supreme Court stated clearly and unequivocally:

> "The constitutional privilege against self-incrimination is essentially a *personal* one applying only to *natural individuals*.
>
> "• • • [I]t cannot be utilized by or on behalf of any organization, such as a corporation." (Emphasis added.) (*id.* at 698-699).

See also *Fleming* v. *Montgomery Ward*, 7 Cir., 114 F. 2d 384, 386-387 (1940), cert. den., 311 U.S. 690.

In the face of this, claimant urges that a corporation may somehow assert the privilege against self-incrimination on behalf of itself, and a broad class of corporate officers and agents, because of what it terms the unique nature of the Federal Food, Drug and Cosmetics Act which imposes criminal liability on officers and agents of the corporation without requiring proof of wrongful intent or consciousness of wrongdoing.

It is true that this Act is an example of the so-called "public welfare statute" which requires no proof of wrongful intent. *Morissette* v. *United States*, 342 U.S. 246, 255-256 (1952); *United States* v. *Dotterweich*, 320 U.S. 277

(1943). However, criminal liability is not, as claimant seems to contend, imposed automatically under this type of law upon every officer or agent no matter how remote his connection with the offending corporation. In *Dotterweich*, the Supreme Court clearly enunciated the proper test. Criminal responsibility for violation of the Federal Food, Drug and Cosmetics Act attaches to those who have a *responsible share* in the furtherance of the transaction which the statute outlaws. "Whether an accused shares *responsibility* in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under proper guidance." (Emphasis added.) *U.S.* v. *Dotterweich, supra* at 284.

It was the duty of this corporate claimant to select an agent who, without fear of self-incrimination, could provide the information requested. The interrogatories were addressed to the corporation and the answer sought was that of the corporation. There is no merit in claimant's suggestion that the answers to the interrogatories must be verified by an officer or managing agent of the corporation. Rule 33 of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that "any officer or agent" of a corporate party "shall furnish such information as is available to the party." It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have.

The default decree was entered by the district court pursuant to Rule 37(d) F.R.C.P., 28 U.S.C.A., which provides:

> "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who

> is to take his deposition, after being served with proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may * * * enter a judgment by default against the party."

Claimant asserts that there was no *wilful* failure to answer since the officer of the corporation, in this case the president, properly asserted his constitutional privilege against self-incrimination even if the corporation had no such privilege. We have answered this contention above. Claimant had a duty to appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation. No attempt was made to do so.

The disjunctive wording of the rule, above, would seem to indicate that a showing of wilfulness is necessary only on failure to appear for deposition. Assuming that such is not the case, however, we hold that what is intended by "wilful failure" to comply with the rule is any intentional failure as distinguished from involuntary non-compliance. No wrongful intent need be shown. *Brookdale Mill Inc.* v. *Rowley*, 6 Cir., 218 F. 2d 728, 729 (1954).

But beyond that, we are singularly unimpressed with claimant's arguments, in view of the following statement made by claimant's president in an affidavit accompanying the motion to dismiss and for summary judgment: "I have not made any false or improper claims in connection with the marketing of this product. My products are marketed based upon extensive research and consultation with experts." Thus, though first representing to the court that it had such information available and implicitly offering it in support of this motion, when it was later served with

interrogatories seeking details of such "extensive research and consultation," claimant asserted its claimed privilege.

Finally, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) relied on by claimant is inapposite since in that case the Supreme Court felt that dismissal under Rule 37 was too harsh a remedy where there was evidence of a good faith effort to comply with the rule. No attempt was made to comply in this case.

We hold that the trial court did not err in entering the default decree upon proper motion by the Government and notice to claimant.[3]

The judgment and decree of condemnation is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[3] In their briefs both parties refer to *United States* v. *42 Jars, etc.* * * * *Bee Royale Capsules*, D.C.D. N.J., 160 F. Supp. 818 (1958) and 162 F. Supp. 944 (1958), and note an appeal pending therefrom in the Third Circuit. In an opinion filed March 12, 1959, the Court of Appeals for the Third Circuit affirmed, deciding the issues identical to those considered in the instant appeal agreeable with the result reached in this opinion, *viz*: that the action taken by the Post Office Department upon its fraud complaint and subsequent settlement was no bar to the action brought under the Federal Food, Drug and Cosmetics Act, (thus rejecting the proposed rule of *"res adminis'rata"*, see note 1, *supra*); that the corporate claimants could not resort to the Fifth Amendment as a basis for refusing to answer interrogatories, and that it was within the trial court's discretion to enter a default judgment under Rule 37(d), F.R.C.P., 28 U.S.C.A., by reason of such failure to answer. Thus, we find ourselves in complete agreement with the Third Circuit although, in our consideration and determination of this case we did not have the benefit of its prior holding.

Decree of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, March 31, 1959

Before

HON. F. RYAN DUFFY, Chief Judge
HON. JOHN S. HASTINGS, Circuit Judge
HON. WIN G. KNOCH, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 12514

UNITED STATES OF AMERICA,
Libelant-Appellee,

vs.

3963 Bottles, More or Less, Etc., OWEN LABORATORIES, INC.,
Claimant-Appellant.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

The mandate of the Court of Appeals was stayed on April 16, 1959.

APPENDIX B

Statutes

The Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301, et seq.), provides in pertinent part:

Sec. 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded; • • •

Sec. 301 (d). The introduction or delivery for introduction to interstate commerce of any article in violation of section 404 or 505.

Sec. 303 (a). Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

Sec. 304 (a). Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which

may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at anytime thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however*, That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard)

shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business to which the case shall be removed for trial.

Sec. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

Sec. 505. (a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

The Federal Rules of Civil Procedure provides in pertinent part:

Rule 33. Interrogatories to Parties. Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the persons making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, en-

larges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined * * *

Rule 37 (d). Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

The United States Constitution, Amendment 5, provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FILE COPY

JUN 12 19
JAMES R. BROWNING

No. 925

In the Supreme Court of the United States

OCTOBER TERM, 1958

3963 BOTTLES, MORE OR LESS, ETC., OWEN LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:	
Curcio v. *United States*, 354 U.S. 118	5
United States v. *Dotterweich*, 320 U.S. 277	5
United States v. *Radio Corporation of America*, 358 U.S. 334	5
United States v. *White*, 322 U.S. 694	5
Statutes and rules:	
Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040:	
21 U.S.C. 334	3
21 U.S.C. 355	4, 5
39 U.S.C. 259	2
39 U.S.C. 732	2
Federal Rules of Civil Procedure:	
Rule 33	4, 5
Rule 37(d)	4

509708—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 925

3963 BOTTLES, MORE OR LESS, ETC., OWEN LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 5a–13a) is reported at 265 F. 2d 332.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1959 (Pet. 14a). The petition for a writ of certiorari was filed on May 15, 1959. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Post Office Department, in terminating fraud order proceedings upon a stipulation by a seller of patent medicine that he

would cease making specified representations alleged to be fraudulent, bars a later action under the Food, Drug, and Cosmetic Act to condemn a quantity of the patent medicine shipped in interstate commerce and alleged to be misbranded and to be a new drug for which no application had been filed.

2. Whether a corporation may refuse to answer interrogatories concerning violations of the Food, Drug, and Cosmetic Act on the ground that officers of the corporation might be incriminated.

STATEMENT

1. Prior to the proceedings in this case, the Post Office Department filed a complaint with the Chief Hearing Officer of the Department alleging that petitioner was making false and fraudulent representations in the advertising of its patent medicine "Enerjol" and seeking, under 39 U.S.C. 259 and 732, the issuance of a fraud order against delivery of mail to petitioner (App. 59–61). Thereafter, on September 26, 1957, petitioner executed an "affidavit of agreement" which, after referring to the complaint, provided (App. 56–58):

> With a view to obviating the necessity for further proceedings herein, it is voluntarily agreed:
>
> That in any future mail order operation of the enterprise involved in this proceeding, affiant will not represent or make any claims for the preparation being sold in said enterprise that. * * * [enumerating 11 specific claims of beneficial effects of the medicine].
>
> That the acceptance of this affidavit by the Assistant General Counsel * * *, as a basis for

disposing of the pending charges now involved herein shall not be construed as an approval of any business which the said affiant has conducted or may hereafter conduct * * *;

* * * * *

Affiant understands that this affidavit relates exclusively to the proceeding specified in the caption hereof and its filing will not act as a defense or relieve the undersigned of responsibility for violation of any other statute, but the filing shall not be construed as a confession that the said instant statutes or any other statute has been violated; * * *.

Petitioner further agreed that upon resumption of the conduct agreed to be discontinued a fraud order might issue without further inquiry into the falsity of the representations. Petitioner discontinued using its previous circulars (App. 44), and no further action was then taken on the complaint.[1]

2. On December 9, 1957, the United States brought an action in the United States District Court for the Northern District of Illinois to condemn, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334), 3,963 bottles of "Enerjol" which had been shipped by truck in interstate commerce on November 18 and December 5, 1957. The amended libel of information alleged (1) that the article was misbranded in that the circulars accompanying it falsely represented that it was effective in the treatment of certain

[1]Petitioner states that in a later proceeding it was found that its new literature did not contain the representations agreed to be discontinued (Pet. 3-4). That proceeding, though immaterial in any event, is not part of the record in this case.

conditions for which it was not and (2) that the article was a new drug for which no effective application had been filed under 21 U.S.C. 355(b) (App. 4–5).

Petitioner filed a claim to the article seized and moved to dismiss the action and for summary judgment on the ground that the prior Post Office Department proceedings were a bar to the action (App. 41–43). The district court, in a memorandum opinion (App. 61–63), denied the motions.

The Government had served upon petitioner written interrogatories, under Rule 33, F.R. Civ. P., concerning the literature used by petitioner in the sale of its product (App. 11–41). Petitioner, after its objections to the interrogatories were overruled, refused to answer the interrogatories on the ground that the "matters inquired into are privileged under the Fifth Amendment" (App. 63–64). For petitioner's wilful failure to answer the interrogatories, the court, on the Government's motion under Rule 37(d), entered a default judgment decreeing condemnation of the property (App. 66–67). The court of appeals affirmed (Pet. 5a–13a).

ARGUMENT

1. Petitioner's contention that the prior Post Office Department proceedings should be a bar to this action is frivolous. The affidavit of agreement filed with the Department did not, as petitioner asserts, determine "permissive" advertising claims; it was simply a stipulation by petitioner that it would cease making, in its mail order operations, specified representations which the Department had charged were

fraudulent. It expressly disclaimed implied approval of any other representations or relief from compliance with any other laws. It is self-evident that, by agreeing not to make specified representations through the mails, petitioner did not acquire an immunity to ship mislabeled articles in interstate commerce by truck, whether the representations be the same or different.[2] Since his premise falls, there is no occasion to consider other defects in petitioner's argument (see, *e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334).

2. Petitioner contends that requiring it to answer the interrogatories violated the privilege against self-incrimination. It is settled, however, that the privilege does not extend to a corporation and that a corporate officer may not withhold corporate records on the ground that he might personally be incriminated. *E.g.*, *Curcio* v. *United States*, 354 U.S. 118, 122; *United States* v. *White*, 322 U.S. 694, 698–701. It is urged that an exception should be made where the corporation is charged with a violation of the Food, Drug, and Cosmetic Act, because the officers can be held liable without a finding of criminal intent on their part, citing *United States* v. *Dotterweich*, 320 U.S. 277. However, only those officers responsible for the particular transaction are held liable and, under Rule 33, F.R. Civ. P., any officer or agent of the corporation, including its attorney,

[2] Obviously, also, the prior proceedings could have no bearing on whether "Enerjol" was a "new" drug and therefore banned from commerce without an application having been filed under 21 U.S.C. 355(b)—an entirely separate ground for the condemnation action.

may answer interrogatories, thus eliminating the possibility of personal self-incrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959